



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office of the Assistant Secretary

MAR 12 1999

AFBCMR 98-02440

MEMORANDUM FOR THE CHIEF OF STAFF

Under the authority of Section 1552, Title 10, United States Code, Air Force Instruction 36-2603, and having assured compliance with the provisions of the above regulation, the decision of the Air Force Board for Correction of Military Records is announced, and it is directed that:

The pertinent military records of the Department of the Air Force relating to [REDACTED] be corrected to show that

a. The Vacation of Suspended Nonjudicial Punishment imposed on her under the provisions of the Uniform Code of Military Justice on 21 October 1997, be, and hereby is, set aside and all rights, privileges and property of which she may have been deprived be restored.

b. The discharge proceedings under AFI 36-3208, dated 18 November 1997, be, and hereby are, declared void and removed from her records.

c. She was not discharged on 19 November 1997, but was continued on active duty and ordered permanent change of station to her home of record.

Handwritten signature of Raymond H. Weller in cursive.

RAYMOND H. WELLER
Chief Examiner
Air Force Board for Correction
of Military Records



DEPARTMENT OF THE AIR FORCE
AIR FORCE LEGAL SERVICES AGENCY (AFLSA)

4 Dec 98

MEMORANDUM FOR AFBCMR

FROM: AFLSNJAJM

112 Luke Avenue, Room 343
Bolling Air Force Base, DC 20332-8000

SUBJECT: Correction of Military Records of [REDACTED]

Applicant's request: In an application dated 29 Jul 98, the applicant requests that she be reinstated in the Air Force with reimbursement of all lost pay, rank and benefits, or to be equally compensated. She also asks that her general (under honorable conditions) discharge be upgraded. Her application is submitted in a timely manner in accordance with the three-year limitation provided by 10 U.S.C. 1552(b).

This review addresses only the sufficiency of the military justice actions taken against the applicant; in particular, the vacation of her suspended reduction in rank under Article 15, UCMJ. This review does not address whether or not the evidence is adequate to support her administrative discharge for misconduct. The case file should be forwarded to AFPC/JA for a review of the sufficiency of the administrative discharge action.

Facts of military justice action: On 23 Jun 97, the applicant received a letter of reprimand for allegedly failing to properly weigh in during the annual squadron weigh-in, and then lying about it when questioned. On 4 Jul 97, the applicant unlawfully struck another person, resulting in nonjudicial punishment under Article 15, dated 22 Jul 97. Her commander imposed punishment consisting of 45 days extra duties, forfeiture of \$450.00 pay and a suspended reduction in rank to airman basic. On 22 Jul 97, the applicant unsuccessfully appealed the finding and the punishment. The applicant subsequently received a letter of reprimand, dated 21 Oct 97, for failure to perform the extra duty details in a safe and prudent manner. In addition, also on 21 Oct 97, the applicant received notice from her commander of his intent to vacate the suspended reduction in rank for allegedly willfully disobeying a lawful order by failing to perform the extra duties in a safe and prudent manner. In response, the applicant provided letters from three extra duty supervisors who indicated she performed extra duties in an exemplary manner. After considering all of the documentation, on 27 Oct 97, the commander vacated the suspended punishment, reducing the applicant to the grade of airman basic.

On 3 Nov 97, the applicant was notified by her commander of his intent to discharge her based on a pattern of misconduct under AFI 36-3208, paragraph 5.50.2. In response, the applicant submitted several letters in support of her desire to remain in the Air Force, including a letter from the victim of the incident that initiated the Article 15 action, who stated that her original statement to the security police was an exaggeration. Nevertheless, the applicant was administratively discharged for a pattern of misconduct. Her discharge was characterized as a general discharge under honorable conditions.

980 2440

Applicant's contentions: The applicant believes that documentation and evidence that she provided on her behalf was intentionally not included or allowed to be used in her defense. She claims that this evidence was proof of her innocence, and if it were considered in her defense, she would have been found innocent. Furthermore, she claims that the actions taken against her were discriminatory.

Discussion: The issue is whether the applicant should be reinstated into the Air Force and, if so, whether she should be compensated for all pay and benefits lost since her discharge. If the Board determines that the applicant should not be reinstated, the Board may refer her to the Discharge Review Board to request an upgrade of her discharge.

Although the applicant believes that documentation and evidence she provided on her behalf was not allowed to be used as part of her defense, she provides no evidence to support this claim. The final discharge package appears to include all of the evidence submitted with the applicant's BCMR application, with the exception of a summarized report of investigation from the 20 Fighter Wing Inspector General. That report, however, absolved the applicant's former squadron of any wrongdoing. The applicant has provided no evidence to support her claim that she was disallowed from submitting the I.G. report in her defense.

The disciplinary actions taken against the applicant appear to be legally sufficient, with the exception of the vacation of suspended reduction in rank. This action was based on a violation of Article 90, for willfully disobeying a lawful command from a superior commissioned officer to perform her assigned extra duties in a safe and prudent manner.

The first element of this offense is that the accused received a lawful command from a superior commissioned officer. In this case, however, there is no evidence that the applicant actually received an order or command from a superior commissioned officer. Instead, the file contains a description of the extra duty program, which is provided to all participants in the extra duty program. The alleged failure to obey an order is apparently based on the following language in the description of the program: "This program has been initiated by the 20 FW Commander and therefore failure to comply with these standards and rules would constitute failure to obey his/her direct order." This description is not signed by the commander. Although this language purports to create an order from the commander, it falls short of a direct order. Mere language stating that the commander initiated a program does not equate to a direct order. Article 90 of the Uniform Code of Military Justice requires that an order be directed specifically to the subordinate by a superior commissioned officer. In addition, the order must be a specific mandate to do or not to do a specific act. A warning to "obey the law" or to perform one's military duty does not constitute an order under Article 90. See Manual for Courts-Martial (MCM), paragraphs 14(c)(2)(b) and 14(c)(2)(d). Therefore, the evidence fails to satisfy the first element of Article 90; that the applicant received a lawful command from a superior commissioned officer. Accordingly, the vacation action that reduced the applicant to the rank of airman basic was not legally sufficient.

If the Board agrees that the vacation action is not legally sufficient, the next issue is whether applicant should be compensated for lost pay, benefits, and rank. The Board has the authority to provide such compensation to the applicant. 10 U.S.C. §1552(c) provides that the Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant. In

9802440

the case at hand, the applicant was reduced to Airman Basic (E-1) on 27 Oct 97 as a result of the vacation action. Her rank remained the same until her discharge on 19Nov 97. Assuming the Board determines the vacation action should be nullified, the applicant should be restored to her previous rank of Airman (E-2), effective 27 Oct 97, with all pay and benefits adjusted accordingly.

Finally, if the Board decides the vacation action is not legally sufficient, it should also determine whether the file nonetheless supports an administrative discharge under AFI 36-3208, paragraph 5.50.2., for a pattern of misconduct. In other words, does the underlying misconduct which was the basis for the vacation action, combined with the other instances of misconduct, provide an adequate basis for applicant's involuntary separation from the Air Force. That issue is most appropriately addressed by AFPC/JA.

Recommendation: Based on the above, I recommend the following regarding the applicant's request for relief:

- a. That the Board determine the vacation action, dated 27 Oct 97, to be legally insufficient and remove it from the applicant's records;
- c. That the applicant be restored to the grade of Airman (E-2), effective 27 Oct 97;
- d. That the applicant be compensated for the difference in the rate of pay between E-1 and E-2 for the period of 27 Oct 97 to 19Nov 97; and
- e. Assuming the Board finds the vacation action legally insufficient, that the case file be forwarded to AFPC/JA to review whether or not administrative discharge is otherwise supported by the evidence.



LOREN S. PERLSTEIN
Associate Chief, Military Justice Division
Air Force Legal Services Agency

99J2440



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE PERSONNEL CENTER
RANDOLPH AIR FORCE BASE TEXAS

2 February 1999

MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/JA (Major Reed)
550 C Street West Ste 44
Randolph AFB TX 78150-4746

JE lication for tion of Military Records [REDACTED]

REQUESTED ACTION: Applicant requests to be reinstated in the Air Force with reimbursement for all loss of pay, grade, and benefits resulting from her administrative separation.

BASIS FOR REQUEST: Applicant believes that evidence she provided as part of her defense was intentionally not included in her discharge package, and that the evidence proves her innocence.

FACTS: At the time of her discharge, 19 Nov 97, applicant was a first term airman basic and had been serving on active duty since 12 Jun 96. She was discharged under the provisions of Air Force Instruction 36-3208, Administrative Separation of Airmen, paragraph 5.50.2, for engaging in a pattern of misconduct—conduct prejudicial to good order and discipline. The specific reasons for discharge were:

1. That between 9 and 13 Jun 97, applicant failed to properly weigh-in during the annual squadron weigh-in and lied about it stating that the First Sergeant had weighed her in. For this offense, she received a letter of reprimand for which she refused to acknowledge receipt.
2. That on 4 Jul 97, applicant unlawfully struck another person on the face with her fist. For this offense, applicant received an Article 15, UCMJ, nonjudicial punishment action which established an unfavorable information file (UIF). The punishment imposed under Article 15 consisted of forfeiture of \$450.00 pay, 45 days of extra duties, and a suspended reduction from airman (E-2) to airman basic (E-1).

9802440

3. That between 11 Sep 97 and 9 Oct 97, applicant willfully disobeyed a lawful order to perform her extra duties in a safe and prudent manner. Specifically, she failed to wear a seatbelt, work gloves, and safety equipment while mowing and weed-eating, was late returning from lunch, and failed to complete her work in a thorough and timely manner, resulting in the work being redone. Applicant received a letter of reprimand, dated 21 Oct 97, for these offenses, and her suspended nonjudicial punishment was vacated on 27 Oct 97, resulting in her reduction to airman basic.

Applicant was notified that she had been recommended for discharge on 3 Nov 97. Applicant responded to the proposed discharge by letter dated 4 Nov 97. That letter does not list any attachments and references only a letter by [REDACTED], the victim of the assault, which was included in the discharge package.

On 18 Nov 97, [REDACTED] approved applicant's discharge, directed that she be discharged with a general, under honorable conditions, characterization, and denied her probation and rehabilitation under Chapter 7 of AFI 36-3208.

Applicant timely filed her application with the Board on 29 Jun 98.

DISCUSSION: We have reviewed the advisory opinion prepared by AFLSNJAJM on 4 Dec 98. We concur in their opinion regarding the legality of the 27 Oct 97 vacation of suspended nonjudicial punishment action. Therefore, our discussion will be limited to the administrative aspects of applicant's case and application of AFLSA/JAJM's findings of irregularity in the vacation action to the administrative discharge. We will address first, applicant's specific allegations of error in the discharge process.

Applicant alleges that documentation and evidence that she provided in her defense during the discharge process were not made part of the discharge action and were not considered as part of [REDACTED]'s decision to discharge her. We disagree.

First, applicant has not made specific allegations. She has submitted no evidence that any specific document she submitted was not made a part of the discharge case file. With the exception of the [REDACTED] summary report attached to applicant's DD Form 149, all documents she has submitted to the Board were included in her discharge package. Nothing in her submissions to the discharge authority would indicate that the IG summary was submitted at that time.¹ Therefore, we conclude her submissions were in fact reviewed by the separation authority as indicated in the 13 Nov 97 legal review (paragraph 3) by [REDACTED], and that no error or irregularity occurred in processing her administrative separation from the Air Force.

¹ It is our opinion that since the IG summary report exonerates her unit, even if she had submitted the report as part of her discharge response it would not have persuaded any separation authority to have retained her.

98 62440

Next, we **turn** to the effect of AFLSA/JAJM's determination that the vacation of the suspended nonjudicial punishment **was** not legally sufficient. First, discharges are not based on punishment a member may have received, but on the conduct that precipitated the punishment. **Thus**, for the purpose of legal sufficiency of the discharge, it is irrelevant whether the Article 15 vacation action was legally sufficient—what is relevant is the conduct. However, the conduct, according to the language of the commander's notification of discharge, was that applicant "willfully disobeyed a **lawful** order from . . . a superior commissioned officer, to perform assigned extra duties in a safe and prudent manner." Since AFLSA/JAJM determined that there was no lawful order within the meaning of Article 90, UCMJ, we defer to their finding and determine that there also was no lawful order within the meaning of AFI 36-3208. **Thus**, an error has occurred in applicant's records.

In truth, applicant's conduct was still criminal. It violated the portion of Article 90 dealing with dereliction of duty, a lesser offense. Furthermore, in **our** opinion, had the commander cited dereliction of duty, instead of violation of an order **as** the third basis for discharge, the discharge would have been legally sufficient. However, since dereliction of duty does not necessarily involve willful misconduct, we cannot determine that the commander would definitely have discharged applicant if dereliction of duty had been cited **as** part of the basis for discharge. Therefore, we cannot conclude that applicant was not materially affected by the error in her records.

RECOMMENDATION: Consistent with the analysis above, we recommend that the Board remove both the vacation of nonjudicial punishment action and the administrative discharge from applicant's records and that the Board direct that applicant be reinstated with appropriate back pay, allowances, and supplemental promotion consideration. We also recommend that the Board advise applicant that her records will reflect that the Article 15, nonjudicial punishment, dated 22 Jul 97, and the LOR, dated 21 Oct 97, were unaffected by the Board's decision and will be continued in her active UIF until normal disposition.



R. Philip Deavel

R. PHILIP DEAVEL, Colonel, USAF
Staff Judge Advocate

9702440